DECISION AND ORDER

The Human Rights Code, 1981, S.O. 1981, c. 53

IN THE MATTER OF:

The Complaint dated November 8, 1983, made by John Belliveau alleging discrimination in employment on the basis of handicap by the Steel Company of Canada, Hamilton, Ontario, and its servants and agents, including John MacArthur, Superintendent; Dr. N. E. Siksay, Medical Department; Brian Lisson, Personnel Department, and Ted La Frinier, Assistant Superintendent.

BEFORE: Peter A. Cumming, Q.C., Board of Inquiry

APPEARANCES Mr. Tom Bell,
for the Ontario Human Rights Commission.

Ms J. Baker,
for all Respondents.

1. Introduction

This Inquiry involves a Complainant, John Belliveau, who began employment in 1971 as a labourer in the coke ovens department at the corporate Respondent Stelco Company of Canada's ("Stelco") steel factory (called the "Hilton Works"), in Hamilton. Mr. Belliveau was injured twice in 1980 while on the job. The resulting medical problem centres upon the Complainant's left acromioclavicular joint, or put simply, his left shoulder. Hence, he became physically disabled due to bodily injury, and was off work for some time, receiving workmen's compensation. Mr. Belliveau received a medical clearance from his own physician and attempted to return to work June 2, 1983, but was not allowed to because the Respondents were of the opinion that he was incapable of performing the essential duties or requirements because of his handicap.

The individual Respondent, Brian Lisson, has been an employee of Stelco since 1965 and was the prime person within Stelco's management with the Personnel and Industrial Relations department who dealt with Mr. Belliveau and other employees injured and entitled to Workmens' Compensation Board ("WCB") benefits. The individual Respondent, John MacArthur, was superintendent of the coke ovens department at the Hilton Works at the relevant times, and the individual Respondent, Dr. N. E. Siksay, is a physician of Stelco at its Hilton Works.

Mr. Belliveau alleges Stelco was in breach of sections 4(1) and 8 of the Human Rights Code, 1981 S.O., 1981 c. 53 ("the Code") (the relevant time frame in this hearing is prior to amendments by S.O. 1984, c. 58, s. 39, and by S.O. 1986, c. 64, s. 18).

The Complainant has a physical handicap and he was not allowed to return to work because of this handicap, or at least, because of the perception of this handicap. Prima facie, there is a breach of sections 4 (1) and 8, of the Code. To reject an employee in the position of Mr. Belliveau without unlawfully denying him equal treatment with respect to employment, an objective assessment is required of the employer, and the onus is upon the employer to establish by a preponderance of evidence that the employee is not capable of performing the essential requirements of the job. If this is done by the employer, then section 16(1)(b) (now section 16(1)) removes the act of discrimination from the prima facie unlawful categorization. See Cindy Cameron v. Nel-Gor Castle Nursing Home and Marlene Nelson, (1984) C.H.R.R. D/2170 at paras. 18494, 18498, 18508, 18509. The Complainant asserts that he could do the job or, at the least, the Respondents did not meet the onus under the Code of establishing that he could not do the essential requirements of the job.

It should be stated at the outset that there was no malice on the part of Stelco's management in its actions. Clearly, malice is not a prerequisite to liability: it is enough if there is an intentional act of discrimination whatever the motives for a prima facie case of unlawful discrimination under section 4(1) and 8 to be established. However, if Stelco was correct in its assessment that Mr. Belliveau was incapable of performing or fulfilling the essential duties or requirements because of his handicap, then there is no unlawful discrimination, by reason of then section 16(1)(b) of the Code (now section 16(1)).

Mr. Belliveau is a guileless, simple, working-man who became confused, frustrated, depressed, moody, and angry given his employment difficulties with Stelco. He had to go on public welfare for a period of time following upon his rejection by Stelco in June, 1983. The overall situation was extremely hard upon him, his wife and children.

The onus is upon the Respondents to establish that the Complainant is incapable of doing his job. As stated, it is not enough for the Respondents to have an honest belief in the Complainant's inability - rather, they must show on an objective basis that a reasonable person in the position of the employer would conclude he was incapable. Moreover, if an employer can

accommodate the employee without undue hardship, then the employer must do so. Put otherwise, an employer cannot establish that an employee is incapable unless it shows that reasonable accommodation is either not possible at all, or at least that it is not possible without undue hardship to the employer. Although section 16(1a) of the present Code, which expressly imposes the reasonable accommodation requirement, was not in force at the times relevant to this Complaint, the case law has held that the requirement of reasonable accommodation was inherent to the wording of section 16(1)(b) as originally enacted. See Cameron, supra at para.18368. That is, 16(1a) of the present Code was, in my opinion, simply enacted for greater certainty.

Although the Code, in the above-cited provisions, imposes positive obligations that put employers to some cost and inconvenience, it is clear that the Ontario legislature has seen these provisions as necessary and appropriate, given both the societal value of integrating disabled persons into its mainstream and also the starting underlying premise to the Code of ensuring equal rights of opportunity for all residents of Ontario. If true equality of opportunity is to be realized, then when an individual, otherwise qualified, is rejected because of his handicap, the onus is properly upon the one who asserts that this person is incapable of performing the task. At that point, it is the employer who is the one assuming a factual proposition - i.e. that the prospective employee is incapable of performing

the essential duties or requirements of the job and therefore, there is a justifiable reason for not employing him.

The Complainant seeks, amongst other remedies, compensation for lost wages for a two year period, June 3, 1983 to June 5, 1985, plus interest from November 14, 1983. A Complainant has a duty to mitigate his damages. Mr. Belliveau received only about $16,200 from part time or temporary jobs and welfare over the two year period following June 3, 1983. Mr. Belliveau claims lost wages totalling $48,000 before tax is considered.

I have reviewed the new Code generally as it relates to persons with disabilities in Cameron, supra.

The structure of the Code places the onus upon the employer to establish that the handicapped person is incapable of performing the essential duties of the job, and at the same establish that the employer cannot take affirmative steps to reasonably accommodate the individual's handicap. See Cameron, supra paras. 18363 to 18369, pages D/2177, D/2878. Undoubtedly, this approach was taken by the Legislature because many employers prejudge the ability of the handicapped to their disadvantage, and it is within the employer's knowledge as to what the essential duties of the job are, and what are the possibilities of reasonable accommodation.

The Code seeks to secure equality of opportunity for the handicapped with respect to employment. Everyone is entitled to the same opportunity to make the most of his or her life, regardless of physical or mental handicap. Thus, an employer must make a decision respecting employment of a handicapped person based upon a fair and accurate assessment of his true ability, and not based upon a stereotype or misconception about a disability.

The law insists that every person receives a fair chance to show what he is able to do, taking into account his ability. The law protects every person from being pre-judged because of handicap by an employer. Equal opportunity for someone with a handicap means equal opportunity to do the things he can do effectively. The law does not impose any undue hardship upon the employer, or require that a person who presents a danger to the safety of the employee himself or others, be employed.

A respondent cannot rely upon mere impressimistic evidence that a person can not perform the essential functions of a job. In some situations it will be very obvious that a person is not able to perform the essential requirements. However, where the handicap does not, in itself, suggest that there is a reasonable certainty of his being unable to do the task, the

logical route for the employer is to put the person to either the test of the job itself, or to the test of a simulated equivalent.

The Respondent Stelco was obliged to make reasonable efforts to investigate the implications of Mr. Belliveau's disability, in the circumstance of the medical clearance given by his physician on June 1, 1988, to the extent necessary to establish on a preponderance of evidence whether he was then capable of fulfilling the essential requirements of the coal handler's job and in doing so, without putting himself at risk of further injury to his continuing injured shoulder. (See, for example, B.C. Timber Ltd. (Skeena Pulp Division) v. Pulp, Paper and Woodworkers of Canada, Local No. 4, (1983) 4C.H.R.R. D/1557; Michael Ward v. Canadian National Express, (1982) 3 C.H.R.R. D/689; David J. De Jager v. Department of National Defence, (1986) 7C.H.R.R. D/3508).

The Evidence

The Complainant was hired as a labourer in Stelco's coal handling unit in 1971. While working, he injured his left shoulder March 17, 1980, and was off work, except for 10 days in April, until May 19, 1980. On October 10, 1980, he again injured his left shoulder while working, and was off work until December, 1980. He returned to his regular duties about December 15, 1980, but given the pain in his left shoulder, he again left his

regular duties. He returned to work May 3, 1982, and worked at his regular duties until June 11, 1982, at which time he again left his regular duties due to complaints of discomfort in his left shoulder. He then worked briefly on so-called "light duties" until June 15, 1982, but this type of work was then not made available. In June, 1983, the Complainant sought to return to his regular duties as a coal handler.

Over the period from March, 1980, until June, 1983, when the Complainant was off work he received Workmens' Compensation Board benefits. The Complainant alleges discrimination because of handicap over this period of time, alleging that there was not reasonable accommodation and that he should have received light duties on a permanent basis, or at least, more often. I have no doubt in finding on all the evidence that there was reasonable accommodation by the Respondents over this period of time. To the extent that the Complainant was not given light duties, it was because none were available.

Stelco has a very large work force to manage, and these events unfolded during a major recession with substantial lay-offs. The entire Stelco operation was shut down by a strike from July 31, 1981 to December 5, 1981, when a gradual recall began. Mr. Belliveau must have known this, yet his Complaint (Exhibit #3, para. #4) overlooks it.

Due to the downsizing of Stelco's operations, light duty jobs became very scarce. No new employees have been hired by Stelco since 1981, and many laid off at that time have yet to be recalled for work. Some 4,500 jobs were lost over the period 1981-1983.

Moreover, it would have been in the economic self-interest of Stelco to give Mr. Belliveau light work if it was available, because Stelco was funding Mr. Belliveau's WCB benefits.

Following upon a comprehensive medical assessment of March 10, 1983, Mr. Lisson specifically asked Mr. MacArthur, Mr. Belliveau's supervisor, March 17, 1983, if he could accommodate Mr. Belliveau with a job that would take into account the restrictions upon his doing over-the-shoulder lifting. (Exhibit #125). Two days later he again spoke with Mr. MacArthur, and determined that in fact no light duty jobs were available (Exhibit #127).

It was not easy to obtain a transfer for Mr. Belliveau to another department because of a history of absenteeism and minor disciplinary problems.

Accordingly, there was no unlawful discrimination in respect of the Complainant before June, 1983. However, the main issue in the case relates to the events that then transpired, and whether there was unlawful discrimination in respect of those events.

There is no doubt that following upon his accidents the Complainant had, and continues to have, a physical disability in that he cannot use his left shoulder in labour without discomfort and pain, and in particular, cannot lift weights above his shoulder without pain. Mr. Belliveau has taken physiotherapy, anti-inflammatory medicine, continuing treatment from a nerve-stimulating machine, and lifted weights, to build up the strength of his shoulder. He has been well-motivated and cooperative in receiving treatment and in attempting to rehabilitate himself. Most importantly, as his physician Dr. Trotter testified, Mr. Belliveau learned eventually to work through his pain.

There was considerable evidence on the issue as to whether the coal handling position in fact required over-the-shoulder lifting. The Complainant argued that this requirement was minimal and that in any event he could make adjustments in his shoveling so that it would not be a problem. However, Mr. Belliveau himself allowed in his testimony that above-shoulder level lifting amounted to perhaps one and one-half hours a day. The job description, the oral testimony of various witnesses, and

my own observations from the view taken, indicate that the coal handler's job includes a significant amount of shoveling of coal on to moving conveyor belts, various other prodding and poking actions, and some lifting above the shoulder level. The simple fact that Mr. Belliveau experienced problems with his left shoulder when he tried to do his regular duties at various times in 1980 to 1982 following upon his initial injuries, suggests that there was significant above-the-shoulder movement required.

Moreover, Dr. Trotter indicated that it was not simply lifting over his left shoulder, but also long hours of repetitive work that caused him pain. She confirmed that some of the shovelling motions in themselves would aggravate Mr. Belliveau's left shoulder.

In my opinion, on all the evidence, lifting coal above the shoulder level was a necessary or essential requirement of the coal handling job. Apart from all the other considerable evidence on this point, the simple fact that on several occasions (See Exhibit #2: April, 1980; December, 1980; June, 1982) after he returned to his regular duties, Mr. Belliveau could not continue to work because of the pain in his left shoulder, suggests that over-the-shoulder movement was substantial.

In my opinion, the main issue is not whether Mr. Belliveau had to lift his shovel above his shoulder level as an

essential requirement of his regular duties. I find on the evidence it was, and that the coal handler job required above the shoulder work. Rather, the real issue is whether Mr. Belliveau in fact could perform his regular duties as of June 2, 1983, including this essential requirement, simply because he was then able, or prepared, to tolerate the associated pain and discomfort. If this was so, was the Respondent Stelco then obliged to let Mr. Belliveau return to his regular duties as of that time, and did the denial to him constitute unlawful discrimination?

In January, 1983, Mr. Belliveau underwent a five or six week assessment under the supervision of Ms Jan Worley of the Vocational Assessment Unit of the Chedoke Rehabilitation Centre of the Chedoke McMaster hospitals.

The WCB and Ms Worley had been asked by Stelco to determine whether Mr. Belliveau could return to his regular duties as a coal handler.

The Report of the Occupational therapist, Ms Jan Worley (Exhibit #74) dated March 10, 1983, (referred to hereafter as the "Chedoke report") indicated clearly that with above shoulder lifting, Mr. Belliveau's left "arm fatigued quickly and became painful ... [and] persisting with such activity aggravated his symptoms and would cause the pain to radiate into his neck ...

[with] migraine headaches." (p.3 of Exhibit #74)

The prognosis of Ms Worley in the Chedoke report was one "of likely permanent restricted movement at the acromioclavicular joint." (p.3, Exhibit #74) The Report concluded that the Complainant "is capable of returning to regular employment at Stelco if alternate work areas incorporating his limitation of overhead work can be accommodated." (emphasis added) (p4, Exhibit #74).

Dr. J. E. Trotter was the Complainant's physician. Dr. Trotter specializes in physical medicine and rehabilitation, her expertise being in respect of physical disorders causing dysfunction. Dr. Trotter's reports of January 7, 1981 (Exhibit #56), January 28, 1981 (Exhibit #57), March 11, 1981 (Exhibit #59), April 3, 1981, (Exhibit #60), June 5, 1981 (Exhibit #61), June 24, 1981 (Exhibit #62), October 16, 1981 (Exhibit #63), December 29, 1981 (Exhibit #64), February 17, 1982 (Exhibit #65), March 11, 1982 (Exhibit #66), April 19, 1982 (Exhibit #67), June 17, 1982, (Exhibit #69), August 25, 1982, (Exhibit #70), February 24, 1983 (Exhibit #72), March 2, 1983 (Exhibit #71) all indicate that the Complainant had serious problems with his left arm and lifting above the shoulder, such that he should not return to his regular job as of the dates of the reports. A physiotherapist's report of June 2, 1981 (Exhibit #58) is to the same effect. Thus, all of the medical evidence prior to June, 1983, is

supportive of the conclusion reached in Ms Worley's Chedoke report.

However, Dr. Trotter found a significant improvement in the Complainant's condition when he was examined June 1, 1983 (Exhibit #73) and accordingly, gave a one sentence note (Exhibit #6) for Mr. Belliveau to give to Stelco, advising he could go back to his regular duties.

What caused this unexpected and sudden change of status for Mr. Belliveau? It is undisputed by the Complainant himself and his physicians that he could not do the coal handling duties prior to June, 1983. Mr. Belliveau testified he never asked Dr. Trotter before June 1, 1983, to let him go back to his regular duties.

Mr. Belliveau had found work through the Chedoke assessment at a shopping mall plaza in May, 1983, doing janitorial work as part of his rehabilitation assessment, and had worked there for only six days. He did not at all like the plaza work, particularly given its very low rate of pay as compared to what he had earned at Stelco, quit and went to see Dr. Trotter, June 1, without even telling his WCB worker. If Mr. Belliveau had stayed on at the plaza, once his WCB benefits ended he would earn only $3.50 an hour rather than $11.00 an hour at Stelco plus benefits. Mr. Belliveau was understandably frustrated and angry.

However, he was now prepared to tolerate the pain associated with his regular duties as a coal handler at Stelco, although he would still prefer to have alternative work if it was available.

Mr. Belliveau attended at Stelco June 2, 1983, with the medical clearance (Exhibit #6) from Dr. Trotter, and was seen by the individual Respondent, Dr. N. E. Siksay, a Stelco physician. Dr. Siksay gave Mr. Belliveau a brief, cursory physical examination and authorized his return to regular duties as of June 6, 1983, in the coke ovens, relying largely upon Dr. Trotter's clearance. After a cursory examination, and largely on the faith of the note from Dr. Trotter, Dr. Siksay gave a "Return to Work Report" (Exhibit #7) June 2, authorizing a return to regular work.

In the meanwhile, Stelco's management had learned of Mr. Belliveau's intention to return to work June 6, 1983. The individual Respondent, Mr. John D. MacArthur, Superintendent of the coke ovens at the time, spoke with Mr.Brian Lisson, both expressing skepticism as to whether Mr. Belliveau's medical situation had changed since the March 10, 1983 Chedoke assessment report (Exhibit #74) three months earlier which suggested that Mr. Belliveau could not lift above his left shoulder. Management of Stelco was dealing with an employee who had then been away from work for an entire year, and had only worked very

intermittently before June, 1982, due to the accidents in March and October of 1980. Mr. Belliveau had been absent some 86.3% of the time (Exhibit #5) since March 11, 1980, the date of his first major accident. In January, 1983, he had been assessed by the WCB as having a permanent ten per cent disability. Everything to this point of time, and in particular, the Chedoke assessment report of March 10, 1983, indicated Mr. Belliveau would not be able to again do his regular duties as a coal shoveler. Until at least February, 1983, Mr. Belliveau's own communications with Ms Worley of the WCB and Dr. Trotter, suggested he also believed he could not return to his coal handler position. However, suddenly and surprisingly he had been cleared by Dr. Trotter to come back to his position.

There were vague suggestions that Stelco's management did not want Mr. Belliveau back as a regular employee because of his overall work record since 1971, involving some absenteeism and minor discipline problems. However, I have no doubt in finding that while Stelco's management did not regard Mr. Belliveau as other than at most just a satisfactory employee, they were not trying to be unfair with him. Rather, they were concerned that Mr. Belliveau was not fit to do the work required, and had a further concern that he might aggravate further the physical problems associated with his injury, if he again attempted his regular duties. Stelco had always honoured return-to-work notes from Mr. Belliveau's physicians until June 6, 1983.

Dr. Siksay testified that Stelco relies heavily upon the personal physician's opinion as to an employee's condition.

Following upon Mr. Belliveau's visit to Dr. Siksay June 2, 1983, Mr. Lisson and Mr. MacArthur asked Dr. Siksay to review the Chedoke Report (Exhibit #74) and again see Mr. Belliveau June 6, 1983, which he did.

There is a difficulty in understanding what was said by Mr. Belliveau at this re-evaluation June 6, 1983. Dr. Siksay was of the understanding that Mr. Belliveau agreed the restrictions upon overhead lifting, as referred to in the Chedoke March 10, 1983, report (Exhibit #74), still applied. Dr. Siksay's entry in the Stelco Employee's Industrial Accident Record relating to Mr. Belliveau (Exhibit #52) for June 6, 1983, notes that Mr. Belliveau "agrees restrictions are legitimate [sic] remain off". Dr. Siksay impressed me as a competent, honest witness and I accept his evidence that he understood that to then be Mr. Belliveau's position.

However, at the same time, it is also obvious that Mr. Belliveau was seeking a return to regular duties from the simple fact that he had seen Dr. Trotter June 1, and Dr. Siksay June 2 and 6, for the sole reason of returning to Stelco. Moreover, when Mr. Belliveau saw Mr. MacArthur after his visit to Dr. Siksay June 6, it is apparent from Mr. MacArthur's own evidence

that Mr. Belliveau maintained he could do the coal handling and would return to the coal shoveler's job if permitted.

How does one reconcile this confusing situation? In my view, Dr. Siksay understood Mr. Belliveau to be saying to him on June 6 that his persistent problems with his left shoulder continued. Dr. Siksay concluded that Mr. Belliveau was unable to lift above his shoulder. What Mr. Belliveau intended to communicate was that he would return to his regular duties, if nothing else was available, and simply endure the pain. Given all the circumstances, it is not difficult to conclude that there was an unfortunate misunderstanding between Dr. Siksay and Mr. Belliveau.

While I do not believe it is appropriate to say Mr. Belliveau was at fault for the misunderstanding, I have no doubt that Dr. Siksay concluded from Mr. Belliveau's own words the incorrect impression that Mr. Belliveau was still not able to lift a shovel above shoulder level.

Following upon the June 6, 1983, decision of Stelco's management not to let Mr. Belliveau return to his regular duties, Mr. Belliveau immediately submitted a grievance under the Collective Bargaining Agreement (Exhibit #84).

The Grievance Information Sheet in respect of the

grievance filed by Mr. Belliveau (apparently from its wording, on June 7, 1983) in a form of statement as though given by Mr. Belliveau himself (although signed by the union steward, David Moores) indicates that Mr. Belliveau was also seeking through Dr. Siksay an alternative position from Stelco whereby he would not have to reach over his head. The point is, Mr. Belliveau's own statement as given in his grievance is not substantially different from Dr. Siksay's testimony as to their conversation June 6, 1983.

The arbitration of the grievance was not concluded until September 19, 1984 and the decision given November 2, 1984. The majority decision (with the company nominee dissenting) found that Stelco had reasonable grounds "for doubting the employer's medical fitness to return to work ... [but] did not do all that was possible to substantiate those grounds." Exhibit #9, p. 10) While finding that Mr. Belliveau confirmed the restrictions in lifting to Dr. Siksay, the Arbitration Board ordered that Stelco should obtain a further vocational assessment from Chedoke and from Dr. Trotter. When this was completed by June, 1985, Mr. Belliveau was considered fit to return to his regular coal handling duties, and he then did so. Subsequently, he has taken another position within Stelco.

The Board of Arbitration in its decision found there was "confirmation by the Grievor" (Exhibit #9, page 8) of the

reassessment by Dr. Siksay June 6. The Arbitration Board accepted Dr. Siksay's testimony before it that when Dr. Siksay questioned Mr. Belliveau June 6, Dr. Siksay "found from the Grievor that he, the Grievor, felt the restrictions were still valid." (Exhibit #9, p. 6) The Arbitration Board held that Mr. Belliveau "... in confirming the information as to the restricted lifting means he is not entitled to lost wages as a result of the Company's action" (Exhibit #9, p. 10)

If Mr. Belliveau had made it clear to Dr. Siksay that he thought he could do the above shoulder level lifting in spite of the pain, the logical thing for Dr. Siksay to have done then was to let Mr. Belliveau try to do the coal handler's job, or be otherwise tested in a suitable fashion.

In my opinion, a disabled person in Mr. Belliveau's position must effectively communicate that he clearly believes he is capable of doing the essential requirements of the job. An employee cannot simply remain silent when decisions are made in good faith that affect his interest, and say later that the company failed to take initiatives. Mr. Belliveau was the person mainly responsible for not quickly sorting out and clarifying his medical situation following upon the June 6 rejection of his return to regular duties by Stelco.

An employee with a disability has a right to return to

work if he is capable of doing the essential requirements of the job. This right is not only recognized and protected by the Code, but is inherent to the employer-employee relationship in the instant situation as determined under the Collective Bargaining Agreement (See Exhibit #9, p.5). At the same time, the employer has the right to ensure that the employee is not endangered in doing his regular duties. If there is a substantial risk of injury given the employee's disability, the employer can take the position that the employee cannot fulfil the essential requirements of the job. Indeed, an employer may have an obligation under the Occupational Health and Safety Act, R.S.O. 1980, c. 321 to be reasonably certain that the employee is medically fit.

Thus, there must be a delicate balancing of the interests of employer and employee, as seen in the instant situation.

Stelco had reasonable grounds for thinking the Complainant was medically unfit. However, it did not take all the steps appropriate to determine the issue of fitness.

The actions of Stelco's management were less than complete when Mr. Belliveau was rejected on medical grounds June 6. Dr. Siksay could have referred the matter back to Dr. Trotter, given that it was her medical clearance of June 1,

initially accepted by Dr. Siksay, that was now implicitly in dispute. Dr. Trotter was Mr. Belliveau's personal physician and had followed the full history of his left shoulder problem. Moreover, she is a specialist in physical medicine and rehabilitation. The medical information required clarification rather than Dr. Siksay acting simply upon the Chedoke report of March 6 and the Complainant's own comments, misunderstood as confirming it.

Dr. Siksay in his own testimony agreed that Mr. Belliveau was unlikely to suffer further injury from a return to the coal handling job, that the best test would be on the job to determine whether Mr. Belliveau could do the job, and that he should have contacted Dr. Trotter. Dr. Trotter, in her testimony stated that she also was of the opinion there would be no risk of further injury through Mr. Belliveau again shovelling coal.

The Complainant argues that the onus is upon Stelco to assess him objectively, as required by then section 16(1)(b) (now section 16 (1)) of the Code, and that Stelco failed to make a reasonable assessment. The Complainant asserts that Dr. Trotter's one sentence medical clearance had the consequence of stating that he could perform or fulfill the essential duties of the coal handler position. However, it was not as though Stelco had not given Mr. Belliveau any assessment. Stelco had paid for and initiated the Chedoke assessment culminating in the Chedoke

report of March 10, 1983 which found that limitations would continue in respect of over-the-shoulder lifting.

In my view, the primary responsibility in the instant unfortunate situation was upon Mr. Belliveau to clarify the medical situation. An employer has certain, limited means of acquiring the necessary information through an assessment, but a main input must be the cooperation of the employee and the relevant information the employee has at his disposal. There is a responsibility upon an employee to make available all relevant information within the employee's control. Mr. Belliveau did not ask Dr. Trotter to contact Stelco, nor did he suggest to Stelco that it contact Dr. Trotter. If the Complainant had gone back to Dr. Trotter immediately upon his rejection by Stelco June 6, 1983, she undoubtedly would have sent her June 1, 1983, report, (Exhibit #73) to Stelco which would have given some back-up and confirmation to her clearance, and probably would have given a further report. Mr. Belliveau did not even go to see Dr. Trotter again until October 5, 1983, four months after being rejected for regular duties by Stelco. Dr. Trotter's report (Exhibit #75) of that examination suggests continuing pain in the left shoulder. The report does not suggest in any way that she was then being asked by Mr. Belliveau to re-authenticate with Stelco her medical clearance of June 1, 1983, or to communicate with Stelco to clear up the confusion over the medical situation. Her report of March 15, 1984, relating to the Complainant's visit the previous day,

is to the same effect.

It was not until June 7, 1985 (Exhibit #77) subsequent to a further reassessment by Chedoke, pursuant to the direction of the Arbitration Board, that Dr. Trotter stated that Mr. Belliveau "was judged fit for work". (Exhibit #77)

Ms Worley did the second assessment May 6-31, 1985, following upon the Board of Arbitration direction. There apparently was some delay in this assessment taking place because Mr. Belliveau had found temporary employment and did not want to take time off. Mr. Belliveau cancelled an assessment program set for November, 1984, scheduled by Stelco to implement the Arbitration award, because he was working elsewhere at the time. (Exhibit #137).

Mr. Belliveau has to accept the consequences of not expediting a clarification of his medical problems. Mr. Belliveau's problems were exacerbated following his June 6, 1983, rejection by Stelco, because he had terminated his WCB benefits, other than the 10% permanent disability pension, by leaving the reassessment to attempt to return immediately to Stelco.

For the reasons given, in my view Mr. Belliveau is the person who is primarily responsible for his lack of reinstatement with Stelco for a substantial period of time following upon his

rejection June 6, 1983. Mr. Belliveau's own negligence in not clarifying quickly his medical status, particularly when the confusion was in large part due to himself through his conversation with Dr. Siksay June 6, 1983, must impact very significantly upon any remedies he is otherwise entitled to.

Having said the above, in my opinion, the Respondent Stelco and Siksay have not established a defence under then section 16(1)(b) (now section 16(1)) of the Code. When an employer receives a medical clearance from a physician, even though it is very surprising given the past medical history and even though it is cryptic in form and outline as in the instant situation, the employer has a duty to inquire of that physician as to the reality of the situation, before rejecting the clearance and hence, the employee. Although the employer's situation is mitigated in the instant case because of the employee's own confusing statements about his medical status, the employer has a duty to take all reasonable steps to establish the correct medical situation. At a minimum, this includes a follow-up upon a medical clearance that is being contradicted. Therefore, in my opinion, and I so find on the evidence, the Respondents Stelco and Siksay were in breach of sections 4(1) and 8 of the Code. The Complaint is dismissed as against the other individual Respondents, as it was Dr. Siksay alone who had the responsibility ultimately for rejecting the Complainant June 6, 1983. However, in the circumstances, I am of the view that the

Complainant's damages should be limited to a relatively nominal sum, which I would fix at $2,000.00, representing lost wages for approximately a one month period.

ORDER

1. IT IS DECLARED that the corporate Respondent, Steel Company of Canada, and the individual Respondent Dr. N. E. Siksay, were in breach of sections 4(1) and 8 of the Human Rights Code, 1981, S.O. 1981, c. 53 on June 6, 1983, in discriminating against the Complainant, John Belliveau, because of his handicap.

2. IT IS ORDERED that the Respondents Steel Company of Canada and Dr. N. E. Siksay are jointly and severally liable to pay forthwith to the Complainant as damages for lost wages the sum of two thousand ($2,000.00) dollars.

DATED at Toronto this 30th day of May, 1988.

Peter A. Cumming
Board of Inquiry